**THE HON'BLE Ms. JUSTICE G. ROHINI**

**WRIT PETITION NO.16976 OF 2005**

**Dated: 30th September, 2005.**

Between:

Serum Institute of India Ltd.,

212/2, Hadapsar, Pune-411028 (India),

rep. by its Sales Manager Mr. R. Padma Kumar,

S/o. N. Radha Krishnan Nair. … Petitioner

And

1. The Andhra Pradesh Health and Medical Housing and Infrastructure Development Corporation, rep. by its Managing Director, D.M. & H.S. Compound, Sultan Bazar, Hyderabad-500 095.
2. L.G. Life Sciences India Private Limited, L.G. House, AB-3, Safadur jung Enclave, New Delhi-110 029, India, rep. by Senior Manager Institutional Business. … Respondents

**THE HON'BLE Ms. JUSTICE G. ROHINI**

**WRIT PETITION NO.16976 OF 2005**

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**ORDER :**

This writ petition is filed questioning the illegal action of the 1st respondent

Corporation in reconsidering the technical bid of the 2nd respondent Company which was earlier rejected by the Technical Committee in pursuance of the Tender Notice dated 25-5-2005 for procuring Hepatitis-B Vaccine as arbitrary and illegal.

The facts, in brief, may be noted as under :

On a request made by the Commissioner of Family Welfare to procure 46.55 lakhs doses of Hepatitis-B Vaccine with World Health Organisation (W.H.O.) pre-qualification, the 1st respondent Corporation floated a global tender vide Tender Notice dated 25-5-2005 inviting tenders through e-procurement platform (on line) for supply of Hepatitis Vaccine. The last date for receipt of tenders was 22-07-2005. As per the tender conditions stipulated under the Tender Notice, only those domestic and international manufacturers complying with W.H.O. pre-qualification and having at least Rs.1 crore annual turnover are eligible to participate.

The petitioner Company as well as the 2nd respondent Company who claim to have possessed all the required qualifications prescribed under the Tender Notification have participated in the said Tender on Line by submitting their technical as well as financial bids within the time prescribed for submission of tenders. Another company by name M/s. Shantha Biotechnics Limited also submitted its bid.

It is not in dispute that on a request made by the 1st respondent Corporation, the Commissioner of Family Welfare constituted a Technical Committee consisting of 3-Members for examining the technical bids received. On 22-7-2005 the technical bids received from the three firms were evaluated by the Technical Committee, and it was found that the 2nd respondent Company was only an importer and the W.H.O. pre-qualification was actually held by one L.G. Life Sciences Limited, Korea. However, the technical bids submitted by the writ petitioner as well as M/s. Shantha Biotechnics Private Limited were cleared. Consequently, in view of the remarks of the Technical Committee, the financial bid of the 2nd respondent was not opened and the financial bids of the other two firms were opened on 25-7-2005. It is not in dispute that the petitioner firm was found to be the lowest bidder between the two

qualified bidders. However, on the same day i.e, 25-7-2005, the 2nd respondent made a representation to the 1st respondent Corporation stating that their Company is a wholly owned Subsidiary of M/s. L.G. Life Sciences Limited, Korea and they commenced the Pharmaceutical Business in India with the permission of the Ministry of Commerce & Industry, granted on 3-12-2002. The 2nd respondent Company also stated that a Foreign Company without their Indian Subsidiary cannot bid in the tender and that as per the Drugs & Cosmetics Act, no pharmaceutical product can be imported in the country without the registration of the foreign exporter with the Drugs Controller General (India) and it is also necessary for the importer to have registration and import licence. It was also stated that their parent company has given an authorization letter to it to submit that bid and sign the contract for supply of goods and that the said authorization also extended full guarantee and warranty for the goods specified in the bid documents. In pursuance of the said representation submitted by the 2nd respondent Company, the 1st respondent Corporation has decided to open the financial bid of the 2nd respondent Company. Aggrieved by the said action of the 1st respondent Corporation, the present writ petition has been filed primarily contending that the 1st respondent Corporation has committed a grave error in reconsidering the decision of the Technical Committee in rejecting the technical bid of the 2nd respondent Company and the said action of the 1st respondent Corporation which is in flagrant violation of the tender conditions is liable to be declared as arbitrary and illegal.

The facts narrated above though not disputed by the 1st respondent Corporation as well as the 2nd respondent Company, it has been pleaded in their respective counter-affidavits that the allegation of the writ petitioner that the 2nd respondent Company was not a manufacturer with W.H.O. pre-qualification and therefore its technical bid was rejected by the Technical Committee is incorrect. It was the plea of both the respondents 1 and 2 that the 2nd respondent Company is a wholly owned subsidiary of L.G. Life Sciences Limited, Korea and therefore there is no legal infirmity in considering the technical bid of the 2nd respondent. Thus, according to the respondents, there was no illegality or arbitrariness on the part of the 1st respondent Corporation in deciding to open the financial bid of the 2nd

respondent.

I have heard the learned Counsel for both the parties at length and perused the material on record.

The learned Counsel for the writ petitioner submitted that since admittedly the 2nd respondent Company has no manufacturing unit, it is not a manufacturer, leave alone possessing W.H.O. pre-qualification as required under the tender conditions. Hence, its technical bid was rightly rejected by the 3-Member Expert Committee who were technically equipped in the field of Vaccine. The learned Counsel vehemently contends that the 1st respondent Corporation is not empowered to reconsider such decision of the Technical Committee and therefore the action of the 1st respondent Corporation in proceeding to open the financial bid of the 2nd respondent Company is arbitrary and illegal.

On the other hand, the learned Counsel appearing for the respondents 1 and 2 while reiterating their plea in the counter-affidavits contended that the 2nd respondent Company being a wholly owned subsidiary of L.G. Life Sciences Limited, Korea, it is one and the same as its parent company. According to the learned Counsel, since the parent company at Korea is having the manufacturing facility, the 2nd respondent Company which is a wholly owned subsidiary cannot be held to be disqualified on the ground that the 2nd respondent itself does not possess a manufacturing unit.

For proper appreciation of the rival contentions raised by the parties, it is necessary to note some of the relevant conditions of the tender under the Tender Notification, dated 25-5-2005.

> *"1. Tenders will be received through e-procurement platform @ www.eprocurement.gov.in till 3.00 P.M. (I.S.T) on the date prescribed at page 2 by the Managing Director, Andhra Pradesh Health & Medical Housing & Infrastructure Development Corporation (APHMHIDC), D.M.II.S. Campus, Sulthan Bazar, Hyderabad. for the purchase of 1)*

*J.E. Vaccine from the Manufacturers with valid license 2) For Hepatitis – B Vaccine from the manufacturers complying with WHO prequalification.*

*2. (a) Only from Manufacturing units for, J.E. Vaccine and Hepatitis – B. Vaccine with (Both domestic and International Manufacturers) whose annual turnover is at least Rs.1 crore (Indian currency) are eligible to participate in the Tender.*

*(b) ……..*

*(c) ……*

*3.1 The successful Bidder should submit the following certificates at the time of concluding the Agreement.*

*(a) ……*

b. *……*

c. *Marketing Standing Certificate issued by the Licensing authority as a Manufacturer with at least three years continuous manufacturing license i.e. from 2002-2003, 2003-04, 2004-05 in respect of items covered by Indian Drugs and Cosmetics Act, 1940 and Rules there covered by Indian Drugs and Cosmetics Act, 1940 and Rules thereunder for each drug quoted as the case may be or market standing certificate issued by the licensing authorities of the country concerned.*

d. *……..*

e. *……..*

f. *……..*

g. *Documents, if any, to show that the manufacturing unit has been recognised, by WHO, UNICEF, ISO certificate etc., (for manufacturers only) and a Statement of HEPATITIS – B VACCINE / J.E. Vaccine supplied to various agencies, with quantities and copies of supply orders of previous three years Supplies made to programmes sponsored by WHO, UNICEF etc., may be mentioned.*

h. *……..*

i. *……*

j. *……..*

k. *……*

l. ……..

m. ……..

n. ……..

*3.1.1 (a) The documents/certificates should be under the name and address of the premises where items quoted are actually manufactured.*

*…… "*

On a combined reading of the above conditions, evidently one of the requirements is that the intending bidder shall be a manufacturing unit for Hepatitis-B Vaccine, whose annual turnover is at least Rs.1 crore to be eligible to participate in the tender. It is also necessary to show that such manufacturing unit has been recognized by WHO, UNICEF, ISO Certificate, etc. It is not in dispute that the tender in question being a global tender both domestic and international manufacturers are eligible to participate.

Admittedly, the 2nd respondent Company does not possess the manufacturing unit of its own. However, it is claimed that the 2nd respondent Company is a wholly owned subsidiary of L.G. Life Sciences Limited, Korea which is one of the largest manufacturers of Hepatitis-B Vaccine in the world and the largest supplier of Hepatitis-B vaccine to U.N. Organisations. It is not in dispute that the 2nd respondent Company submitted its bid based on the manufacturing facility of M/s. L.G. Life Sciences Limited, Korea contending that the manufacturing facility of its parent company should be reckoned for the purpose of the tender in question. In the counter-affidavit filed on behalf of the 2nd respondent Company, with regard to its constitution, it is stated as under :

*"(a) LG Group of Companies, Korea a Fortune 500 Company, has its presence in over 100 countries in the world and is involved in manufacture and marketing of diverse products including Pharmaceuticals, Chemicals, Plastic Products, White Goods like T.V., Refrigerator, Audio/Video Products etc. The combined turnover of LG Group is over USD 70 Billion (approx. equivalent to Rs.3,00,00,000 Crores), for the year ending December 31, 2004.*

*(b) LG Chem Limited, Korea has invested over USD 300 million in R & D and has three biotech/bio chemical research centres in Korea and USA. It has proposed to invest USD 460 million by 2005 and it employs approx. 300 Senior Scientists in research of new molecules. In addition for pharma & life sciences products, it has overseas strategic collaboration with leading Pharmaceutical companies in the world for ex. for Hepatitis B Vaccine it has strategic collaboration with Aventis Pasteur, a leading French conglomerate.*

*(c) LG Chemical India Private Limited (now known as LG Life Sciences Limited India Private Limited – the Second Respondent Company) has obtained requisite licences from the Drug Controller of India and Import Licence for the purpose of Import of Pharmaceutical products into India.*

*(d) Consequent upon incorporation of the Second Respondent Company, its entire shareholding is held by LG Life Sciences Ltd., Korea, to the exclusion of one share, which is being held by a group company viz., LG Chem Limited, Korea. Subsequent to its incorporation, the approval of FIPB (Foreign Investment and Promotion Board) was sought and the same was accorded, vide letter No.FC.I 499 dated December 3, 2002. In terms of Clause 3 of the letter of approval, LG Life Sciences Ltd., Korea was permitted to "set up a wos (wholly owned subsidiary) in India which will engage, either directly or indirectly in importing, marketing, distribution, selling, exporting and/or manufacture of formulation of diverse pharmaceutical and life sciences products and advanced chemical synthetic products including bio-pharmaceutical and biological products and diagnostic kits." Further, it was stated that the foreign collaborator would infuse USD 5-7 million in phases in the paid up capital of the Indian wholly owned subsidiary."*

Having regard to the above facts, the learned Counsel for the 2nd respondent submits that there is complete identity between the 2nd respondent Company and its Parent Company and for the purpose of the tender in question, the parent and subsidiary companies shall be taken as one concern. He also contends that since the 2nd respondent is a subsidiary which sells the manufactured goods of its parent company, under no circumstances it can be treated as a mere trader. He also states that submitting the bids through the subsidiary units is only for the purpose of convenience and to get over some technical difficulties and the same being the international practice in global tenders, it cannot be found fault with.

On the other hand, the contention of the learned Counsel for the writ petitioner is that the plea of the 2nd respondent that the manufacturing facility of M/s. L.G. Life Sciences Limited, Korea has to be reckoned as that of the 2nd respondent company cannot be accepted since it is not permissible under the law to lift the corporate veil in favour of the 2nd respondent. He submits that it is not open to the 2nd respondent Company to ask for unveiling its own cloak and examine as to who in reality is controlling its affairs. He also contends that permitting the 2nd respondent to participate in the Tenders would amount to relaxation of the essential conditions prescribed under the Tender Notification which is impermissible under law.

There can be no dispute about the principle of law that the Company comes into existence only on its incorporation and such an incorporated company has a separate existence and the law recognizes it as a legal entity separate and distinct from its members. It is also a well settled principle that normally the Courts will not treat the company as a nominee of its members. However, where it appears that the corporate personality is being used as a cloak, it is always open to the courts to lift the corporate veil so as to establish that the company has no separate personality and that in fact it is established by some other agency or that the controlling shareholder is some other company.

In STATE OF UTTAR PRADESH v. RENUSAGAR POWER COMPANY while considering an identical issue, the Supreme Court held that where two concerns were closely connected with each other and the affairs of one concern were controlled by the other and the other concern had no independent volition, the corporate veil must be lifted and both the concerns should be treated as one.

In a later decision in NEW HORIZON'S LIMITED v. UNION OF INDIA the Supreme Court having extensively referred to various decisions relating to the principle of lifting the corporate veil right from the case of ARON SALOMON V. A. SALOMON & CO. LTD. (1897 AC 22) held as under :

> *"It cannot be disputed that, in law, a company is a legal entity distinct from its members. It was so laid down by the House of Lords in 1897 in*

*the leading case of ARON SALOMON v. SALOMON & CO. (1897 AC 22). Ever since this decision has been followed by the courts in England as well as in this country. But there have been inroads in the doctrine of corporate personality propounded in the said decision by statutory provisions as well as by judicial pronouncements. By the process, commonly described as "lifting the veil", the law either goes behind the corporate personality to the individual members or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies. This course is adopted when it is found that the principle of corporate personality is too flagrantly opposed to justice, convenience or the interest of the Revenue."*

It is also relevant to note the following observations made by the Supreme Court in LIFE INSURANCE CORPN. OF INDIA v. ESCORTS LTD. :

*"Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficient statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since, that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc."*

From the observations made in the above decisions, it is clear that though initially the principle of lifting the corporate veil was invoked by the Courts only where the company was formed or used to facilitate the evasion of the legal obligations or perpetuate fraud, subsequently the doctrine of lifting of the corporate veil has been expanded to various other situations. In RENUSAGAR POWER COMPANY's case (1 supra) the Supreme Court has observed that the concept of lifting the corporate veil is a changing concept and is of expanding horizons. It was further observed as under :

*"… … it is high time to reiterate that in the expanding of horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must however depend primarily on the realities of the situation. The aim of the Legislation is to do justice to all the parties."*

It is also useful to note the following observations made by the Supreme Court in RENUSAGAR POWER COMPANY'S case (1 supra) while referring to the successive Editions of Pennington's Company Law :

> *"The learned editor of Pennington's Company Law, 5th Edn., at page 49 has recognised that this principle has been relaxed in subsequent cases. He states that the principle of Company's separate legal entity has on the whole been fully applied by the Courts since Saloman's case (1897 AC 22). Corporate veil has been lifted where the principal question before the Court was one of Company Law, and in some situations where the corporate personality of the company invoked was really of secondary importance and the application of the old principle has worked hardship and injustice. In England, there have been only a few cases where the court had disregarded the company's corporate entity and paid attention to where the real control and beneficial ownership of the company's undertaking lay. When it had done this, the court had relied either on a principle of public policy, or on the principle that devices used to perpetrate frauds or evade obligations will be treated as nullities, or on a presumption of agency of trusteeship which at first sight Salomon's case seems to prohibit. Again at page 36 of the same Book, the learned author notes a few cases where the courts have disregarded separate legal entity of a company and investigated the personal qualities of the shareholders or the persons in control of it because there were overriding public interests to be served by doing so."*

In the light of the legal position as noted above and having regard to the contentions advanced by the learned Counsel for both the parties, the question that arises for consideration is whether the manufacturing facility possessed by M/s. L.G. Life Sciences Limited, Korea can be taken into consideration for the purpose of deciding the eligibility of the 2nd respondent Company and for the said purpose is it permissible to invoke the principle of lifting the corporate veil.

It is to be noted that if the manufacturing facility possessed by M/s. L.G. Life Sciences Limited, Korea is not taken into consideration, the 2nd respondent admittedly has not satisfied the eligibility criteria since the 2nd respondent by itself does not possess such facility. However, the 2nd respondent claims that it is a wholly

owned subsidiary of L.G. Life Sciences Limited, Korea which possesses the manufacturing facility as required under the tender conditions and therefore the Tender Committee ought to have lifted the corporate veil, in which event they would have seen the reality that the 2nd respondent having possessed the manufacturing facility has satisfied the tender conditions. In support of his submissions, the learned Counsel for the petitioner placed reliance upon the decision in NEW HORIZON'S LIMITED'S case (2 supra) in which the facts are almost identical to the facts in the instant case.

In the said case, the Department of Telecommunications invited sealed tenders from competent agencies for printing, binding and supply of specified number of telephone directories in English for three annual issues commencing from 1993. One of the conditions of eligibility was as under :

> *"The tenderer should have the experience in compiling, printing and supply of telephone directories to the large telephone systems with the capacity of more than 50,000.00 lines. The tenderer should substantiate this with documentary proof. He should also furnish credentials in this field.*
>
> *… … … … … ….*
>
> *… … … … … ….*
>
> *The successful tenderer will also submit copies of telephone directories printed and supplied by them to the telephone systems of capacity more than 50,000.00 lines as credentials of his past experience."*

The New Horizons Limited (NHL) was also one of the tenderers, however its offer was not considered on the ground that it did not submit any evidence to show that they have in their name undertaken compiling, printing and supply of telephone directories for large telephone systems with the capacity of more than 50,000.00 lines. The case of the NHL was that it was a Joint Venture Company established by Thomson Press India Limited, Living Media India Limited, World Media Limited and Integrated Information Private Limited, a Wholly Owned Subsidiary of Singapore Telecom wherein 60% of shares were held by Mr. Arun Purie and other three companies in the same group and 40% of shares were held by Integrated

Information Private Limited. It was also stated that the Joint Venture has received approval of the Government of India and was currently in operation.

The writ petition filed by the N.H.L. questioning the action of the respondents in not accepting their tender was dismissed by the High Court holding that the experience of a shareholder cannot be the experience of the company nor was NHL the agent of its shareholders. It was also held that the principle of lifting of corporate veil cannot be invoked by NHL either as a ground of attack or as a ground of defence observing that it could not be said that the authorities failed in their duty to look behind the facade of corporateness of NHL and that it was none of their duty and they rightly examined the experience, etc., of NHL and came to the conclusion that it did not satisfy the eligibility conditions and that there was no error in the said approach of the authorities. On appeal by the New Horizons Limited, the Supreme Court disagreed with the view expressed by the Delhi High Court and reversed the decision holding as under :

> *"SEEING through the veil covering the face of NHL it will be found that as a result of reorganization in 1992 the Company is functioning as a joint venture wherein the Indian group (TPI, LMI and WML) and Mr. Aroon Purie hold 60% shares and the Singapore-based Company (IIPL) holds 40% shares. Both the groups have contributed towards the resources of the joint venture in the form of machines, equipment and expertise in the field. The Company is in the nature of a partnership between the Indian group of companies and the Singapore-based company who have jointly undertaken this commercial enterprise wherein they will contribute to the assets and share the risks. In respect of such a joint venture company the experience of the company can only mean the experience of the constituents of the joint venture, i.e., the Indian group of Companies (TPI, LMI and WML) and the Singapore-based company (IIPL).*
>
> *… … … … …*
>
> *Thus, the approach from the legal standpoint also leads to the conclusion that for the purpose of considering whether NHL has the experience as contemplated by the advertisement for inviting tenders dated 22-4-1993, the experience of the constituents of NHL, i.e., the Indian group of Companies (TPI, LMI and WML) and the Singapore-based company, (IIPL) has to be taken into consideration."*

In the light of the ratio laid down in the above case, I find force in the submission of the learned Counsel for the 2nd respondent that this is a fit case where it is necessary to lift the corporate veil and to decide whether the 2nd respondent company and M/s. L.G. Life Sciences Limited, Korea can be taken as one concern.

However, the contention of the learned Counsel for the petitioner is that the corporate veil can under no circumstances be lifted in favour of the 2nd respondent. In support of his contention, the learned Counsel for the petitioner relied upon SINGER INDIA LTD. v. CHANDER MOHAN CHADHA AND OTHERS wherein it was held tha that there cannot be any generalization or rule of universal application. It was also observed that two basic features which *prima facie* show interdependence or pervasive financial control and management control.

In SINGER INDIA LIMITED's case (4 supra) the landlord filed a petition for eviction under the Delhi Rent Control Act stating that the original tenant which was an American Company called Singer Sewing Machinery Company which was incorporated in U.S.A. floated an Indian Company and got amalgamated with it by virtue of the orders of a Company Court. The contention of the landlord was that under the said amalgamation, the leasehold rights came to be vested with Indian Company and thus the tenant has parted the possession and therefore he is entitled to evict the Indian Company and to recover the possession. Though the Rent Controller dismissed the said petition, the appeal of the landlord was allowed and the further appeal by the Indian Company was dismissed by the High Court of Delhi. The Indian Company filed Special Leave Petition in the Supreme Court, in which one of the questions raised was whether the Indian Company was entitled to invoke the doctrine of lifting its corporate veil and to contend that the major shareholder was none other than the American Company itself and therefore it cannot be said that the possession has been parted by the American Company. Having traced the history and development of lifting the corporate veil, the Supreme Court reiterated the principles as under :

> "… … broadly, where a fraud is intended to be prevented, or trading with the enemy is sought to be defeated, the veil of corporation is lifted by judicial decisions and the shareholders are held to be "persons who actually work for the corporation.

… … … … … … …

> The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned."

The Supreme Court has further observed :

> "However, it has nowhere been held that such a course of action is open to the company itself. It is not open to the Company to ask for unveiling its own cloak and examine as to who are the Directors and Shareholders and who are in reality controlling the affairs of the company. This is not the case of the appellant nor could it possibly be that the corporate character is employed for the purpose of committing illegality or defrauding others. It is not open the appellant to contend that for the purpose of FERA, the American Company has effaced itself and has ceased to exist, but for the purpose of the Delhi Rent Control Act is still in existence. Therefore, it is not possible to hold that it is the American Company which is still in existence and is in possession of the premises in question. On the contrary, the inescapable conclusion is that it is the Indian Company which is in occupation and is carrying on business in the premises in question rendering the appellant liable for eviction."

On a careful consideration of the decision in SINGER INDIA LIMITED'S case (4 supra) it is clear that the observation that the corporate veil cannot be lifted in favour of the company was made by the Apex Court totally under a different context having regard to the peculiar facts and circumstances of the said case. No other decision has been cited before this Court in which the said proposition of law has been applied.

Similarly, the ratio laid down in COMMISSIONER OF CENTRAL EXCISE, NEW DELHI'S case (5 supra) is more in favour of the contention of the respondents that because of the financial and management control and the interdependence between the 2nd respondent and its parent company, it is necessary to lift the corporate veil and to treat the manufacturing facility possessed by the parent company as that of the 2nd respondent Company.

In the case on hand, the entire shareholding of the 2nd respondent company is held by L.G. Life Sciences Limited, Korea, except one share which is held by a group company. The specific plea of the respondents is that the 2nd respondent Company is wholly owned and controlled by L.G. Life Sciences Limited, Korea and that the profits of the 2nd respondent Company would be treated as the profit of L.G. Life Sciences Limited, Korea. It was also pleaded that the 2nd respondent Company does not have a separate and independent existence apart from L.G. Life Sciences Limited, Korea. It was also stated that subsequent to the incorporation of the 2nd respondent company, the approval of Foreign Investment and Promotion Board was accorded observing that the foreign collaborator would infuse U.S.D.5-7 million in phases in the paid up capital of the Indian wholly owned subsidiary. It is also the specific case of the 2nd respondent that the bid was submitted by the 2nd respondent Company since a foreign company without there being an Indian subsidiary cannot bid and further as per the Drugs and Cosmetics Act, 1940 no pharmaceutical product can be imported in the country without the registration of the foreign exporter with the Drugs Controller General (India) and further Importer has to have registration and import licence. It is also their case that the 2nd respondent has participated on the earlier occasions in similar tenders invited by the 1st respondent Corporation and was qualified as a manufacturer.

Undoubtedly, all the abovesaid aspects are relevant to be taken into consideration to decide whether there is pervasive financial control and management control by M/s. L.G. Life Sciences Limited, Korea and whether there is complete identity between the 2nd respondent company and M/s. L.G. Life Sciences Limited, Korea. In the light of the legal position noted above, since it is clear that the principle of lifting the corporate veil can be invoked to look at the business realities of a situation without confining to a narrow legalistic view, it appears to me that the Expert Committee, without application of mind to any of the aforesaid aspects, was not justified in concluding that the 2nd respondent company was not qualified on the ground that it was only an authorised importer and the W.H.O. pre-qualification was held by L.G. Life Sciences Limited, Korea.

Though the learned Counsel for the petitioner vehemently contended that such consideration would amount to relaxing an essential condition under the Tender Notification, I am unable to agree. Once, the claim of the 2nd respondent Company that being a wholly owned subsidiary of L.G. Life Sciences Limited, Korea, the 2nd respondent company and its parent company shall be taken as one concern, it would automatically follow that the manufacturing unit possessed by the parent company would enure to the benefit of the 2nd respondent as well, in which event the 2nd respondent would be an eligible tenderer. Hence, the question of relaxation of tender conditions in favour of the 2nd respondent does not arise at all.

However, I find force in the contention of the learned Counsel for the petitioner that the 1st respondent was not justified in reconsidering the technical bid of the 2nd respondent company on its own and in deciding to open its financial bid. Having constituted an Expert Committee for the purpose of examining the technical bids received in response to the Tender Notice dated 25-5-2005, even assuming that the said Committee failed to take into consideration certain relevant factors, the proper course would have been to refer the matter to the Expert Committee for reconsideration on the basis of the representation made by the 2nd respondent company dated 25-7-2005.

In the circumstances, I hold that the impugned action of the 1st respondent Corporation in reconsidering the technical bid of the 2nd respondent company and in deciding to open its financial bid is impermissible and cannot be sustained. Accordingly, there shall be a direction to the 1st respondent Corporation to refer the mater to the Expert Committee constituted for evaluation of the technical bids, to reconsider the technical bid of the 2nd respondent company in the light of the observations made above and to decide afresh whether the 2nd respondent company has satisfied the tender condition with regard to the facility of manufacturing unit. It is made clear that such reconsideration shall be confined only for the purpose of the technical bid of the 2nd respondent company, and in case it is found to be eligible then its financial bid shall also be opened.

It may not be out of place to mention that in the counter-affidavit filed by the

2nd respondent, it has been disclosed that the price quoted by it was Rs.1 crore (approx.) less than the price quoted by the writ petitioner for the expected quantity of vaccine to be ordered by the 1st respondent. In response to the same, the writ petitioner filed an additional affidavit stating as under :

> "I submit that in view of the said decision of the 1st respondent and without prejudice to the contentions of the petitioner in the writ petition, the petitioner company hereby undertakes to supply the said vaccine at a lesser price than what was quoted in the tender which would benefit the Corporation Rs.1,05,20,300/- provided the 1st respondent similarly relaxes the condition of tender, so as to permit the petitioner company to supply the vaccine through its principal Agent based at Hyderabad, namely, M/s.Ankit Pharma. In so far as the said Agent is concerned, it has been in the business of Pharma Distribution since 30 years. The said Agent also possesses the required licences, approvals etc., either under the Drugs Act or under other provisions of law to do the said business. Further, it is also fully equipped to tackle such huge consignment of drugs which need specialized care in supplying and distribution including cold storage cabins."

It is not only premature, but also not necessary for this Court to express any opinion with regard to the respective prices quoted by the writ petitioner and the 2nd respondent. At any rate, the law is well settled that price is not the only criteria for awarding the contract. Hence, it is left open to the 1st respondent Corporation to take into consideration the abovesaid undertaking furnished by the writ petitioner before this Court, in case the technical bid of the 2nd respondent is cleared by the Expert Committee. It is further made clear that this Court has not expressed any opinion with regard to the claim of the 2nd respondent company that the 2nd respondent company and M/s. L.G. Life Sciences Limited, Korea shall be taken as one concern. This Court has only reiterated the principle with regard to the permissibility of the lifting of corporate veil and held that such course is open in the facts and circumstances of the case. Hence, the Expert Committee is at liberty to arrive at its own conclusion as to the claim made by the 2nd respondent company after considering the relevant material produced by it along with its technical bid.

Accordingly, the Writ Petition is disposed of with a direction to reconsider the technical bid of the 2nd respondent company by the Expert Committee in the light of the principles of law as noted above. No costs.

30th September, 2005.

gbs